

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.791 OF 2005
IN
SUIT NO.923 OF 1983

Maharashtra State Road Transport
Corporation .. Plaintiffs

Vs.

Jairam Vishnu Mandpe & Ors. .. Defendants

Mr.V.N.Bodke i/b Vaithy & Co. for the plaintiffs
in support of Chamber Summons

Mr.S.D.Mogre for the defendants to show cause

CORAM : S.U.KAMDAR, J

DATED : 4TH JULY, 2005

P.C.:

1. The present Chamber Summons has been taken out by the plaintiff to lead secondary evidence of the various documents which are set out in Schedule- A of the said Chamber Summons. Plaintiffs has filed affidavit in support of Chamber Summons dt.27.6.05 and a further affidavit dt.4.7.05. In the said affidavit, plaintiffs have stated that the documents were lying at ST Stores

at Kurla and the same has been misplaced and / or lost. It has been also stated that inspite of due diligence documents could not be traced . Documents which are sought to be tendered as and by way of secondary evidence are the xerox copies of the originals which has been sought to be relied upon.

2. In the present case, suit has been filed by the plaintiffs against the defendants for misappropriation of fund by committing fraud with the plaintiff corporation. Defendants at that relevant time were the employees of the plaintiffs' Transport Corporation. Most of the documents which are sought to be produced are the documents which are obtained in the course of documentary evidence against the said defendants. The learned counsel for the defendants has resisted the present chamber summons and has contended that the plaintiffs have not made out any case for bringing secondary evidence on record. He has also contended that the provision of s.63 and 65 of the evidence Act requires certain conditions precedent to be satisfied before the secondary evidence can be

taken on record. The said provision of s.63 and 65 of the evidence Act reads as under:

"63. Secondary evidence - Secondary evidence means and includes -

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

65. Cases in which secondary evidence relating to documents may be given- of the existence, condition, or contents of a document in the following cases:-

(a) When the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in

interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India) to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a) (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the document by any person who has examined them, and who is skilled in the examination of such documents.

3. The learned counsel for the defendants in support of his contentions has further relied upon

the judgment of the Andhra Pradesh High Court in the case of S.t.Bobba Suramma v. Peddireddi Chandramma reported in AIR 1959 Andhra Pradesh 568. In particular he has relied upon para 19 and 20 of the said judgment which reads as under:

"(19) There is another obstacle to the appellant taking advantage of the provisions of Section 65 of the Indian Evidence Act. Secondary evidence can be let in under Section 65 only in certain circumstances one of which is that when the original has been destroyed or lost. The case of the appellant is that it was lost. In support of that case, we have only the evidence of D.W.3. He does not really advance the case of the appellant in any manner on that issue. This is what he deposed in his chief examination:-

"Inukonda Devarakonda Suramma executed a sale-deed in favour of padmanabham which was used in the prior litigation. It is not to be found now, it seems to have been lost. I do not know what happened to it"

In the cross-examination, he admitted that he had never seen the sale deed but that one Ammanna told him that he had seen it. Ammanna, although he is alive, was not examined by the appellant. The statement of D.W.3 that the sale deed executed by Devarakonda Suramma was used in a prior litigation does not seem to be entitled to much weight, in view of his admission that it was Ammannna that was looking into the affairs of Atchamma, the adoptive mother of the fourth defendant, in the prior litigation, namely O.S.No.20 of 1941. Could this be regarded as sufficient material on which the case of destruction or loss of a

document could be based? For one thing, D.W.3 does not know anything about that document.

He was only told by someone that he had seen it. How then could he prove its loss the existence of which he had no knowledge? Moreover he does not definitely speak to the loss of the document. All that he stated was that it was not found by him and therefore it seemed to have been lost. There is not even a whisper of his having conducted a search for it and was unable to trace it. The recitals in the written statement in that regard are significant. This is what is stated in paragraph 4 of the written statement:-

"The whole record relating to the said land was lost at the time of the death of this defendant's adoptive father and mother. Now, after some investigation and with great difficulty the certified copies were obtained and being filed."

At the outset, it should be remembered that no copy of the alleged sale deed was filed before the Court. Therefore, the loss of the record referred to in the written statement could have reference only to documents for which copies were filed into Court. Again, the statement is as vague as it could be. It is not shown as to when exactly the records were lost. It could not be ignored in this context that there was a long interval between the death of the adoptive father and that of the adoptive mother of the fourth defendant.

(20) In order to claim the benefits of section 65 of the Indian Evidence Act, there should be credible evidence of the loss of the original. As pointed out by one of us in *Ananta Raghuram v. Rajah Bommadevara*, AIR 195 Andh Pra 418 at p.421 (Srinivasachari J):

"There must be sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all the sources and means in the search of the document which were available to him."

There is utter paucity of evidence on record in this case. As already stated, excepting the statement of D.W.3 extracted above, there is nothing else in the direction of the proof of the loss of the document. In this connection, we cannot also overlook the fact that the parties had preserved Ex.B-1 of the year 1915, and there is no satisfactory explanation as to how this document was missing and under what circumstances it was lost. The only reasonable inference that could be drawn is that there was no such document, or even if one existed, it was not produced, probably, for the reason that it might be unfavourable to the party.

The District Munsif had contended himself by saying that evidently this document was lost. This is again based on a surmise that there must have been some document executed in 1934 and, if it was not produced, it must have been destroyed or lost. This is our opinion, is not a sustainable conclusion. Both the Courts below had not devoted any attention to this aspect of the case, obviously for the reason that they were not extending the benefits of Section 53-A to the contesting defendant."

4. Thereafter the learned counsel has relied upon the Judgment of Calcutta High Court in the case of M/s.Parekh Brothers V. Kartick Chandra Saha and others reported in 1968 Calcutta 532 (v 55 C 94) and particularly the following portion at

page 536 which reads as under:

"Mr.Ghosh commented, not without justification that it is not at all surprising that the learned trial Judge himself was not prepared to rely on it when he was called upon to decide Issue No.2 on the strength of this exhibit. In this connection, Mr.Ghosh further argued that there is no evidence to show that a sufficient search had been made to trace out the original and until such a search has been made and proved in evidence even the foundation for leading secondary evidence as provided for in S 65 of the Indian Evidence Act is not properly laid. Mr.Ghosh contended that in order to show that a document is lost it is not enough to make a statement that the letter is lost. It is necessary on the other hand to show that there was a diligent search to recover the lost document."

5. By relying on the aforesaid judgments it has been contended that in the present case, no case is made out for the purpose of permitting secondary evidence to be brought on record. He has also relied upon the judgment of the apex court in the case of State of Rajasthan and others v. Khemraj and others reported in AIR 2000 SUPREME COURT 1759 para 3 thereto which reads as under:

"3. In the face of the pleadings of the appellants and the defects noticed by the trial court no fault can be found with the

orders of the trial court or of the High Court. However, it appears appropriate to us, in the interest of justice, to permit the appellant to file a fresh application in the trial court for seeking permission under Section 65 of the Evidence Act to lead secondary evidence supported by a proper affidavit and giving full details necessary to attract the provisions of Section 65 of the Evidence Act."

6. In so far as the present case is concerned, I am of the opinion that the provision of s.63 and 65 are duly complied with and therefore, the plaintiffs shall be permitted to bring secondary evidence on record. Documents which are sought to be produced by the plaintiffs are the copies made from the original by a mechanical process i.e. xerox and therefore, it ensures the accuracy of the copy under provision of s.63 sub-section 2 of the Indian Evidence Act. The said copies can be produced as a secondary evidence in the present case.

7. In so far as reasons for production of secondary evidence is concerned, in my opinion the said s.65 of the evidence Act is also complied with in the present case in as much as sub section (c)

of s.65 provides that when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time then secondary evidence can be produced. On reading of the 2 affidavits dt.29.6.05 and 4.7.05, in my opinion, case has been made out by the plaintiff that the documents are misplaced and could not be traced inspite of due diligence search. One of the additional reasons why I am granting the present chamber summons is that the defendants were the employees at the relevant time with the plaintiff. They are charged with misappropriation of the funds of the plaintiffs' corporation. Documents which are sought to be relied upon are part and parcel of departmental investigation. In my opinion, the person who is charged with serious charge of misappropriation of fund cannot be permitted to escape by raising false technical pleas that the case is not made out for bringing secondary evidence on record. In my opinion, sufficient cause has been made out for bringing the secondary evidence on record and therefore, the present

Chamber Summons is required to be granted. Chamber Summons is made absolute in terms of prayer clause (a). No order as to costs.